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No. 426

In the Supreme Court of the United States

OCTOBER TERM, 1938

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA, PETITIONER,

v.

EISENBERG FARM PRODUCTS,
A PENNSYLVANIA CORPORATION

BRIEF FOR PETITIONER

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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Harrisburg, Pa.

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 332 Pa. 34 and 200 Atlantic 254; it also appears in the record of the present proceedings (R. 32). This opinion, entered June 30, 1938, affirms the decree entered by the Court of Common Pleas of Dauphin County; the opinions of the latter court appear in the record of the present proceedings (R. 15, 26). One opinion of the county court (R. 15) was adopted by the supreme court (below); 332 Pa. 34, at 35.

JURISDICTION

(1) Judgment below:

The order of the court below, the Supreme Court of Pennsylvania, was entered June 30, 1938 (R. 33). A petition for reargument and rehearing filed in said court was denied July 25, 1938 (R. 40). By order entered November 21, 1938, this Court granted a petition for a writ of certiorari to the court below.

(2) Claims and Rulings below:

The decree of the court of common pleas dismissed a bill of complaint filed against the defendant for not complying with the Milk Control Board Law of Pennsylvania, Act of April 30, 1935, P. L. 96 (31 PS Sec. 684). This decree was affirmed by the Supreme Court of Pennsylvania (R. 33). The opinion of that court, written by Mr. Chief Justice Kephart, first determined that the (1) licensing, (2) bonding and (3) minimum price provisions of the statute involved were constitutional as a valid exercise of the State police power. After reaching this conclusion that court held that the application of any provision of the statute to the defendant (engaged in interstate commerce) violated the interstate commerce clause of the Constitution; that the case was "controlled" by the decision of this Court in DI SANTO *v.* PENNSYLVANIA, 273 U. S. 34 (1927) and similar cases.

(3) Statutory Jurisdiction:

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended; 28 U. S. C., Sec. 344(b).

STATEMENT OF THE CASE

The facts in the present case, as admitted by both parties, and as determined by the Chancellor below, are as follows:

The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania, to which the Milk Control Commission is the statutory successor. The defendant is a milk dealer, a Pennsylvania corporation, which leases and operates a milk receiving plant in Elizabethville, Dauphin County, Pennsylvania (R. 16). At this plant the defendant buys milk from approximately 175 farmers in the surrounding section of Pennsylvania, who bring their milk to the plant in their individual cans. At the plant this milk is weighed and tested by the defendant, then dumped into large receiving tanks, wherein the milk is accumulated and cooled for the purpose of shipment (R. 16). This requires retention of the milk for less than twenty-four hours; the milk is transferred from the cooling tanks to tank trucks and is shipped into New York City by these tank trucks operated for defendant, the journey of said trucks being continuous from Elizabethville, Pennsylvania, to New York (R. 16). The milk is not processed in any other manner, and the cooling involved does not change the milk or its constituent parts. All of the milk thus purchased by the defendant is shipped to and resold in New York; none is sold by the defendant in Pennsylvania (R. 16).

Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934, of which approximately 470,000,000 were shipped out of the State (R. 17). The nature of the dairy industry, and the purposes of the present statute, are more fully described

below. The plaintiff board, in applying the above statutory provisions to all milk dealers in Pennsylvania, also required the defendant to (1) obtain a license as a milk dealer; (2) post a bond conditioned for the payment of milk purchased from producers; and (3) pay to farmers the minimum milk prices prescribed by the board (R. 17). With these requirements the defendant refused to comply upon the ground that it was engaged in interstate commerce and therefore not subject to the statute involved. Therefore the plaintiff filed a bill of complaint to restrain the defendant from doing business as a milk dealer contrary to the above statutory provisions. The Chancellor entered a decree nisi in favor of the defendant and against the plaintiff upon August 23, 1937 (R. 24). Exceptions thereto were dismissed by the county court en banc December 7, 1937, and the bill dismissed (R. 31). This decision was affirmed by the Supreme Court of Pennsylvania June 30, 1938 (R. 33). The petition for a writ of certiorari was granted by this court on November 21, 1938.

SPECIFICATIONS OF ERROR

1. The Supreme Court of Pennsylvania erred in holding that decisions of this Court compelled the conclusion that enforcement of the Milk Control Board Law of Pennsylvania against the defendant violated the interstate commerce clause of the Constitution of the United States.

2. The Supreme Court of Pennsylvania erred in sustaining the decree dismissing the bill of complaint brought against the defendant to restrain it from do-

ing business in violation of the Milk Control Board Law of Pennsylvania (Act of April 30, 1935, P. L. 96, 31 PS Sec. 684).

QUESTION PRESENTED

May a State statute regulating the milk industry by requiring that all milk dealers obtain a license, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying milk at its plant within the State from farmers located therein for shipment to another state?

SUMMARY OF ARGUMENT

The defendant in the present case is a Pennsylvania corporation which buys milk at its receiving plant within the State from farmers similarly located therein, which milk is daily shipped to the State of New York for resale by the defendant in the latter state. The Commonwealth of Pennsylvania is here seeking to apply the provisions of its Milk Control Board Law to the defendant with respect to his transactions with such producers, not with respect to his dealings with third persons in other states.

The statutory provisions herein involved would require the defendant (1) to obtain a license, (2) to file a bond for the protection of producers, and (3) to pay farmers the minimum prices prescribed by the Milk Control Board; however, since the statutory provisions are admittedly severable the sustaining of any

one of said requirements in its application to the defendant will require a reversal of the decree below.

The petitioner concedes that the Federal Government has authority under the interstate commerce clause to regulate the transactions here involved. However, such authority is not exclusive; and the state may legislate in exercise of its police power until and unless such legislation is superseded by valid Federal regulation.

In such cases, however, the traditional view is that the State may not "burden" or "directly affect" interstate commerce; but recent cases forego such phraseology and apply practical tests, intended by the framers of the Constitution, who primarily sought to protect non-importing states from barriers imposed by importing states, and to prevent other discriminatory legislation. Hence MUNN *v.* ILLINOIS, and subsequent granger cases, squarely sustain the very type of state police regulation here imposed upon the defendant and all other milk dealers in Pennsylvania who buy milk in the State from producers.

Each of the requirements of the statute herein is designed to protect farmers from fraud and imposition, as well as to promote the public health and public welfare in a business affected with a public interest: The evil to be remedied oppresses the farmer no less because his dealer may resell in a distant state; rather it is greater. Unless a state may protect its own inhabitants under the circumstances herein, the effect of milk control laws in twenty states will be largely nullified because the malpractices of a few can demoralize an entire industry. On the other hand, with the protection herein afforded commerce is actually facilitated.

ARGUMENT

I. A statute enacted as a valid exercise of the state police power in a matter admitting of diversity of treatment according to local conditions, which neither creates an economic barrier to commerce between states nor otherwise discriminates against such commerce, does not violate the interstate commerce clause unless and until superseded by valid federal regulation.

Article I, Section 8, Clause 3, of the Constitution of the United States, delegates to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

This provision has been interpreted to mean, however, that in matters "admitting of diversity of treatment according to the special requirement of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act," TOWNSEND *v.* YEOMANS, 301 U. S. 447 (1937); "so long as the state action does not discriminate," SOUTH CAROLINA *v.* BARNWELL BROS., 303 U. S. 177 (1938).

This is not a new principle. After early uncertainty upon whether the delegation of power over interstate commerce to the federal government was exclusive this Court determined otherwise to the extent above stated: COOLEY *v.* BOARD OF WARDENS OF THE PORT, 12 How. 299, 13 L. Ed. 996 (1851); see also WILSON *v.* BLACKBIRD CREEK MARSH CO., 2 Pet. 245, 7 L. Ed. 412 (1829). The doctrine has been reaffirmed time and

time again, and as recently as SOUTH CAROLINA *v.* BARNWELL BROS., 303 U. S. 177 (1938).

A century ago, this Court definitely recognized the distinction between state regulation of commerce as such, and state police regulations: MAYOR ETC. OF NEW YORK *v.* MILN, 11 Pet. 102, 9 L. Ed. 648 (1837). This Court there sustained a New York police statute which required masters of all vessels arriving in the port of New York to report to city officials certain information upon all passengers carried.

Police regulations fall within the second of the three classes of cases involving the respective spheres of state and federal power over commerce. These cases are tersely classified in COVINGTON & CINCINNATI BRIDGE CO. *v.* KENTUCKY, 154 U. S. 204 (1894), as follows:

> The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.

An interesting discussion of the power of the states to enact police legislation until superseded by Congress, is that appearing in SIMPSON *v.* SHEPARD (Minnesota Rate Cases), 230 U. S. 352 (1913), as follows:

> But within these limitations there necessarily remains to the states until Congress acts, a wide

range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having **the most obvious and direct relation to interstate commerce,** which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, **to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people,** although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge

> of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible. (Boldface ours)

If any requirement of the present statute is to be sustained, it must be proved to fall within the (second) class of "protective measures" above described. Some cases dealing with such measures contain language purporting to differentiate between "directly" and "indirectly" affecting interstate commerce: SIMPSON *v.* SHEPARD, 230 U. S. 352 (1913). Other cases purport to differentiate between "burdening" and "incidentally affecting" interstate commerce: TOWNSEND *v.* YEOMANS, 301 U. S. 441 (1937). But what do these broad, elastic words mean?

Regardless of the phraseology or formula used, all of these cases "rest upon their individual merits"; 2 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d Ed. 1929) Sec. 605, p. 1021. This is so true, that some of the latest decisions of this Court refuse to adhere to such formulas: BALDWIN *v.* SEELIG, 294 U. S. 511 (1935); SOUTH CAROLINA *v.* BARNWELL BROS., 303 U. S. 177 (1938). The latter case frankly concedes that interstate commerce may be "materially interfered with" or "burdened," though sustaining the state statute under attack. This case also defines the distinction between a "burdensome" and an "incidental" exercise of state legislative authority with

respect to interstate commerce in a manner which reconciles the many pertinent cases upon their facts. Said the Court:

> **In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits** because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.
>
> Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with **the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.** Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581, supra; Stephenson v. Binford, 287 U. S. 251, 272, 77 L. ed. 288, 298, 53 S. Ct. 181, 87 A. L. R. 721. (Boldface ours.)

The Court reached these conclusions after the most exhaustive examination of the thought underlying the

rule, interpreting it as the desire to avoid "gain for those within the state an advantage at the expense of those without" (see footnote 2). Certainly this is reflected in the letter of James Madison to J. C. Cabell, written February 13, 1829, appearing in 3 Farrand, Records of the Constitutional Convention (1911) 478:

> It is very certain that it [the interstate commerce clause] grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Directly in point with the above is COVINGTON & CINCINNATI BRIDGE CO. *v.* KENTUCKY, 154 U. S. 204 (1894), supra. The statute herein was invalidated for the following reasons:

> It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but **from Ohio to Kentucky**, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. * * * (Boldface ours)

This Court, in BALDWIN *v.* SEELIG, 294 U. S. 511 (1935), unanimously determined that "formulas and catchwords are subordinate" to one "overmastering requirement" (page 527), stated as follows:

> What is ultimate is the principle that one state in its dealings with another may not place itself

> in a position of economic isolation * * * Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

In this case too the Court has defined "direct" burdens, as follows (522):

> * * * Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.* * *

An accurate concept of what constituted objectionable state interference with interstate commerce, in the minds of the framers of the Constitution, is obtained by examining Article IV of the Articles of Confederation; certainly the problem was the same in 1777 and 1787. This reads: "The better to secure and perpetuate mutual friendship and intercourse * * * the people of each state shall have free ingress and regress **to and from any other State,** and shall enjoy therein all the privileges of trade and commerce, **subject to the same duties, impositions and restrictions as the inhabitants thereof respectively,** provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant. * * *" Thus, it is clear that the essence of unjustified interference was discrimination, and the above authorities show that such discrimination was mainly feared

in the case of **importing** states legislating against non-importing states. Here Pennsylvania, the **exporting** state, is legislating.

In applying these principles to the case at bar, and facing issues instead of language, we find these issues resolved into two tests:

1. Is the Milk Control Board Law of Pennsylvania a valid exercise of the state police power?
2. Does the Milk Control Board Law of Pennsylvania, in its application to the present defendant and all others engaged in buying milk within the state, create an economic barrier between states or otherwise discriminate against interstate commerce?

It is submitted that the present statute meets these tests in a manner which brings the case directly within the principle that a valid exercise of the state police power, in a matter admitting of diversity of treatment according to local conditions, which neither creates a barrier to commerce between states nor otherwise discriminates against such commerce, does not violate the interstate commerce clause unless and until superseded by valid Federal regulation.

However, consideration of the present case involves three separate and distinct problems arising out of the severable character of the statutory provisions at issue. See section 22 of the statute, and the Statement of the Case (R. 15). Hence the foregoing queries must be addressed separately to the (1) licensing,

(2) bonding, and (3) price provisions of the law, and to each said provision.

II. The Milk Control Board Law is a Valid Exercise of the State Police Power

A. The Statute

The essential provisions of the Pennsylvania Milk Control Board Law (Act of April 30, 1935, P. L. 96; 31 P. S. Sec. 684) are as follows: Section 1 declares the milk industry of the Commonwealth to be a business "affected with a public interest." Section 3 defines a milk dealer as any person "who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth." Section 4 creates a Milk Control Board, upon which sections 5, 6, 7 and 8 confer authority to investigate, supervise and regulate the milk industry. Section 9 imposes penalties for violations of the law or orders issued by the board pursuant thereto.

Section 10 provides that a milk dealer "shall not buy milk from producers or others within this Commonwealth for storage, manufacture, processing, distribution, or sale within or without this Commonwealth, or sell or distribute milk within this Commonwealth, unless such dealer be duly licensed as herein provided." Applicants are required to state certain information.[1]

[1] Section 10 C. "The applicant shall state the following:
(1) The nature of the business to be conducted.
(2) The full name of the person applying for the license. If the applicant be a co-partnership or association, the full name of each member shall be stated. If the applicant be a corporation, the names and addresses of all officers and directors shall be stated. (Footnote continued)

Licenses may be refused, suspended or revoked for certain practices[2] by the dealer.

Section 11 imposes certain license fees, graded according to volume of milk handled, varying from $1.00

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(3) The city, borough, incorporated town or township, and the street number, if any, at which the business is to be conducted.

(4) The financial condition of the applicant, including a comprehensive financial statement of his affairs.

(5) Facts showing that the applicant has adequate technical personnel and adequate technical and physical facilities properly to conduct the business of receiving and handling milk, that he has complied with all rules, regulations and orders of the board filed or served as required in this act, and such other facts with respect to the license as may be required by the board pursuant to this act."

[2] Section 10 D. "The board shall grant a license to an applicant complying with the provisions of this act and of the rules and regulations issued by the board pursuant thereto. The board may decline to grant a license to an applicant, or may suspend, revoke or refuse to transfer a license already granted to a milk dealer or may prohibit a milk dealer exempted from the license requirements of this act from continuing to operate as a milk dealer, when satisfied that he has—

(1) Rejected, without reasonable cause, any milk purchased from a producer, or has rejected, without either reasonable cause or reasonable advance notice, milk delivered by or on behalf of a producer in ordinary continuance of a previous course of dealing, except where the contract has been lawfully terminated: Provided, however, That in the absence of an express or implied fixing of a longer period in the contract, (reasonable advance notice) shall not be construed to mean notice of less than one week nor more than two weeks.

(2) Without reasonable cause, failed to account and make payment for any milk purchased from a producer.

(3) Committed any act injurious to the public health or public welfare or to trade or commerce in demoralization of the price structure of milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the Commonwealth affected by this act. * * *

(4) Made a general assignment for the benefit of creditors, or has been adjudged a bankrupt, or there has been entered against him a judgment upon which an execution has been returned wholly or partly unsatisfied.

(5) Been a party to a combination to fix prices contrary to law. * * *

(6) Continued in a course of dealing of such nature as to satisfy the board of an intent of the milk dealer to deceive or defraud producers or consumers.

(7) Failed either to keep records or to furnish the statements or information required by the board.

(8) Made any statement upon which the license was issued which statement is found to have been false or misleading in any material particular.

(9) Where the milk dealer is a partnership or corporation and any individual holding any position, owning any substantial interest therein, or having any power of control therein, has previously been responsible, in whole or in part, for any act on account of which a license may be denied, suspended or revoked pursuant to the provisions of this act.

(10) Where the milk dealer has violated any of the provisions of this act, or any of the rules, regulations or orders of the board."

per annum for dealers handling 20 pounds of milk daily to $5,000 for dealers handling 1,000,000 pounds daily, which fees are payable into a special "Milk Control Fund" for expenses in administering the statute (see Section 17).

Section 12 provides that "a license shall not be issued to a milk dealer purchasing milk from producers within this Commonwealth unless the milk dealer shall execute and file with the application a personal bond approved by the board, * * * conditioned for the prompt payment by the licensee of all amounts due to producers, under this act and the orders of the board, for milk sold by them to such licensee subsequent to the posting of such bond, upon such terms and conditions as the board may prescribe."

Under certain circumstances the board may require a surety or collateral bond instead of a personal bond.

Section 14 prescribes procedure upon appeals from orders of the board.

Sections 15 and 16 authorize the board to require the keeping of certain records and the filing of reports by dealers.[3]

[3] "Section 15. Records.—The board may require licensees to keep the following records:
(1) A record of all milk received, detailed as to location and as to names and addresses of producers or milk dealers from whom received, with butterfat test, prices paid, and deductions or charges made.
(2) A record of all milk sold, classified as to grade, location, and market outlet, and size and style of container, with prices and amounts received therefor.
(3) A record of quantities and prices of milk sold.
(4) A record of the quantity of each milk product manufactured, the quantity of milk used in the manufacture of each product, and the quantity and value of milk products sold.
(5) A record of wastage or loss of milk or butterfat. (Footnote continued)

Section 18 directs the board, with the approval of the Governor, to "fix by official order, the minimum prices to be paid by milk dealers to producers and others for milk." The price may vary according to the production area, sales area, use, form, grade or class of the milk (Section 18-D).

Section 22 provides expressly that the provisions of the law are severable.*

The above Act of 1935 was repealed by the Act of April 28, 1937, P. L. 417, but all proceedings under the former statute were saved by Section 1203 of the latter: COMMONWEALTH *v.* GEORGE ORTWEIN, trading as EAST END DAIRY, 200 Atl. (Pa. Super., 1938) 859.

B. THE LEGISLATIVE PURPOSE

The production, sale and distribution of milk and certain milk products in Pennsylvania have been attendant with serious conditions affecting milk producers, milk dealers and consumers of milk. Hence the General Assembly made a legislative investigation

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(6) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(7) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(8) Such other records and information as the board may deem necessary for the proper enforcement of this act.

"Section 16. Reports—A. Each licensee shall from time to time, as required by rule or order of the board, make and file a verified report, on forms prescribed by the board, of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purposes and intent of this act. Such report shall cover a period of time specified in the order."

* "Section 22. Constitutional Construction.—It is hereby declared to be the legislative intent that if this act cannot take effect in its entirety because of the decision of any court holding unconstitutional any part hereof, the remaining provisions of the act shall be given full force and effect as completely as if the part held unconstitutional had not been included herein."

pursuant to resolution adopted in 1933 and continued by further resolution; approved May 25, 1933, P. L. 1034. As a result the Milk Control Board Law of 1934, Act of January 2, 1934, P. L. 174 was enacted. This statute was reenacted (and amended) by the law herein at issue, the Milk Control Board Law of 1935, approved April 30, 1935, P. L. 96 (31 PS Sec. 684), extending the former act for a period of two years. In 1937 the General Assembly made further legislative findings of fact with respect to the milk industry of Pennsylvania, resulting in the Act of April 28, 1937, P. L. 417, which clarified, strengthened and codified various milk regulations including the earlier measures. These various acts of the legislature,[4] the courts[5] of the Commonwealth and official surveys[6] have described the dairy industry as follows:

*1. Milk is the most necessary human food, vital for promotion of the public health and for development of strength and vigor in the race. It is a most

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[4] Four successive sessions of the General Assembly, as above shown have enacted measures to create and strengthen milk control in Pennsylvania.

[5] Rohrer v. Milk Control Board, 322 Pa. 257 (1936); the decision of the court below (R. 32) in the present case, 332 Pa. 34 (1938); and Harrisburg Dairies Inc. v. Eisaman et al., (1938), (Court of Common Pleas of Dauphin County, Pa.) Appendix A.

[6] See Report of Federal Trade Commission, Sale and Distribution of Milk Products (Connecticut and Philadelphia Milksheds) House Document No. 152, 74th Congress, 1st Session (1935); Report of Federal Trade Commission, Sale and Distribution of Milk Products (Connecticut and Philadelphia Milksheds) House Document No. 378, 74th Congress, 2nd Session (1936); Gaumnitz and Reed, Some Problems Involved in Establishing Milk Prices (U. S. Dept of Agriculture, 1937) 42, et seq.; Cowden and Fouse, Supply and Utilization of Milk in Pennsylvania (Pa. State College, 1936) Bulletin No. 327; and others.

[*] The following 6 (numbered) paragraphs are taken almost verbatim from the preamble of the Act of April 28, 1937, P. L. 417, which recites "legislative findings of fact" pertaining to the milk industry of Pennsylvania. These findings, however, also explain conditions existing when the statute here involved, Act of April 30, 1935, P. L. 96, was enacted, but which conditions were only partly set forth in the preamble to the 1935 Act. **These legislative findings have been confirmed by judicial inquiry:** see Appendix A, and citations in footnote 5, supra.

fertile field for the growth of bacteria, and therefore its production and distribution have been surrounded by more costly sanitary requirements than those of any other commodity in Pennsylvania, which is the third greatest milk producing and consuming state of the nation.

2. Milk consumers are not assured of a constant and sufficient supply of pure, wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk. If this is not done, large numbers dispose of their herds or engage in milk strikes, and remaining producers supply unhealthful milk or milk of lower quality because of financial inability to comply with sanitary requirements and to keep vigilant against contamination. Public health is menaced when milk dealers do not or cannot pay a price to producers commensurate with the cost of sanitary production, or when consumers are required to pay excessive prices for this necessity of life.

3. Milk dealers must handle constant surpluses to meet the emergency requirements of normal variations in fluid consumption and to meet seasonal variations in production, which amounts in excess of fluid requirements must find a market in fluid use or in manufacture, and tend to demoralize the industry. Only one per centum of the milk dealers of the Commonwealth handle over sixty per centum of the milk sold by producers to dealers; and persons have often combined privately to establish practices or fix prices to the detriment of producers or consumers.

4. Milk producers must make delivery of their highly perishable commodity immediately after it is produced, and must generally accept any market at any price. Under the utilization method[6] of payment prevailing in the milk industry, particularly in cities, the value of this market is unknown until the milk dealer sells the fluid milk and uses or disposes of the surplus. Furthermore, only the dealers have facilities for accurately weighing and testing milk. This knowledge of weights, tests and uses is in the exclusive possession of the dealer.[7] The producers' lack of control over their market is aggravated by the trade custom of dealers in paying weeks after delivery, keeping producers obligated to continue delivery in order to receive payment for previous sales, and permitting dealers to operate on the producers' capital without giving security therefor. Hence, milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production.

5. Public control of the milk industry in recent years is stabilizing the conditions therein, and continuation thereof is designed to prevent a return to the unhealthful, uneconomic, deceptive and destructive practices[8] of the past with respect to this paramount industry upon which the health and welfare[9] of the Commonwealth largely depend.

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[6] Fully described in Colteryahn-Sanitary Dairy v. Milk Control Commission, 332 Pa. 15 (1938) at 28.

[7] This is the subject of much discussion in the reports of the Federal Trade Commission, supra, note 6.

[8] Some of the practices to which producers are subjected are apparent in the statutory grounds for refusing and revoking milk dealers' licenses, supra note 2, page 16.

[9] The following appears in the brief (p. 57) filed by the Commonwealth in the Rohrer case, supra: "(a) Pennsylvania is the third greatest milk

6. It is necessary to preserve and promote the strength and vigor of the inhabitants of Pennsylvania, to protect the public health and welfare, and to prevent fraud and imposition upon consumers and producers by treating the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth of Pennsylvania as a business affecting the public health and affected with a public interest.[10]

C. The State Police Power

The above discussion of (a) the statute herein at issue and (b) the purpose thereof is intended to develop that it is a reasonable means adopted to remedy certain public evils within the Commonwealth, and therefore a proper exercise of the state police power. The highest courts of the State have so held, particularly with respect to the provisions requiring that milk dealers (1) obtain licenses, (2) file bonds, (3) pay minimum prices to producers and (4) furnish reports and information.

The first decision sustaining milk control in Pennsylvania is that of Rohrer *v.* Milk Control Board,

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producing state in the United States. In 1934, its total production of milk on farms amounted to 4,495 million pounds, exceeded only by Wisconsin and New York. The amount of milk sold by producers to milk dealers amounted to 2,690 million pounds exceeded only by Wisconsin and New York. See Year Book of Agriculture (1935) Tables 387, 388 (U. S. Department of Agriculture).

"(b) The dairy industry supplies more income to Pennsylvania farmers than any other branch of agriculture. In round numbers, 55 percent of the land of the State of Pennsylvania, or over 15 million acres, were devoted to agriculture in 1934. 47 percent of the entire income of all persons engaged in agriculture in Pennsylvania during that year was derived from dairy products. In 33 counties of the State, 50 percent of the income of the farmer came from dairy products; in 11 counties, 60 percent came from this source. See Bulletin Almanac (1936) 124, 125."

[10] Carolene Products Company v. Harter et al., 329 Pa. 49 (1938) at 60; Rohrer v. Milk Control Board, 322 Pa. 257 (1936).

322 Pa. 257 (1936). As recently as June 30, 1938, the Supreme Court of the Commonwealth, in COLTERYAHN SANITARY DAIRY *v.* MILK CONTROL COMMISSION, 332 Pa. 15 (1938) at 20, unanimously followed the Rohrer case, as follows:

> A number of questions have been raised for the consideration of this Court which will be discussed as presented. We held that the former Milk Control Law (Act of January 2, 1934, P. L. 174) regulating the milk industry by requiring dealers to be licensed and to give bonds with the power in the Board to fix minimum and maximum prices, was a valid exercise of the police power. Rohrer v. Milk Control Board, 322 Pa. 257. The present Act, so far as constitutional questions are concerned, is well within our prior decision, and we need not concern ourselves with that question at this time.

The court below (the Supreme Court of Pennsylvania) in the instant case likewise held (R. 32):

> Before passing on the question presented to the court below as to whether the legislature may, through the Milk Control Law, prescribe certain regulations such as licensing, bonding and minimum prices for producers or dealers in the milk industry, effective where the product is purchased and destined for interstate commerce, we must first decide whether these provisions are valid police regulations under our Constitution. If they are not, then the questions under the commerce clause of the Federal Constitution need not be considered.
>
> We have held in Colteryahn Sanitary Dairy v. Milk Control Commission, and Keystone Dairy Co. v. Milk Control Commission 332 Pa. 15, that the Act of January 2, 1934, P. L. 174, and the Acts

of April 30, 1935, P. L. 96, and April 28, 1937, P. L. 417, amending and reenacting its provisions, are constitutional. See Rohrer v. Milk Control Board, 322 Pa. 257, where it was held that licensing and price-fixing had a direct and substantial relation to sanitation, public health and public welfare. While bonding was not specifically mentioned, it was listed and necessarily included as it was one of the questions in the case. It was conceded at the argument in the present case that the Court could take judicial notice of the fact that licensing and bonding do bear a necessary relation to the preservation and continuation of an adequate supply of pure milk, a necessary article of food in the State, and are in the interest of sanitation and public health.

These provisions are also a protection against the danger of fraud to the producer and public so well described by President Judge Keller in Rohrer v. Milk Control Board, supra. Such regulations, tending to prevent strikes and the dumping of the product on the market, harmful to the public; to provide a fair price and secure its payment, are necessary to prevent cutting off the supply to the public and to assure its purity and necessary quality. With this end in view the bonds are required as securities for the extension of credit by producers, to prevent fraud and imposition on them, and to eliminate irresponsible and dishonest dealers who are a constant menace to the consuming public. Bonding is therefore related to this legitimate purpose, which is a proper exercise of the police power.

Upon their facts both the Rohrer case and the opinions below in the present case sustain the (1) licensing, (2) bonding (3) price provision of the milk control laws. The Colteryahn case sustains, inter

alia, the provisions pertaining to prices; and the furnishing of reports and information (332 Pa. at 21 and 33). Another appellate court decision, COMMONWEALTH *v.* ORTWEIN, individually and trading as EAST END DAIRY, 200 Atl. (Pa. Super., 1938) 859, follows the four aforementioned decisions particularly as to bonding. Another case has recently reaffirmed that the milk industry of Pennsylvania is a business affected with a public interest: CAROLENE PRODUCTS CO. *v.* HARTER, ET AL., 329 Pa. 49 (1937) at 60.

Thus, a definite legislative and judicial policy in Pennsylvania has determined that the statutory requirements here at issue are a valid exercise of the state police power. Furthermore, this cannot now be disputed because of the agreement of facts in the present case by which only the commerce question is submitted (R. 15).

Under such circumstances, the Supreme Court of the United States will not set aside the statute of a State. In NEBBIA *v.* NEW YORK, 291 U. S. 502 (1934), at 539, this Court held as follows:

> If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the

> industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other.

As recently as HIGHLAND FARMS DAIRY, INC. *v.* AGNEW, 300 U. S. 608 (1937), this Court held, at 611:

> The power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price cutting so destructive as to endanger the supply, was affirmed by this court in Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, and in other cases afterwards. Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7; Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 80 L. ed. 669, 56 S. Ct. 453.

This case sustained both licensing and price regulation of milk dealers.

In PAYNE *v.* KANSAS, 248 U. S. 112 (1918) it was held with respect to licensing and bonding of commission merchants:

> Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the states concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended. Rast v. Van Deman & L. Co. 240 U. S. 342. L. ed. 679, L. R. A. 1917 A. 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917 B, 455; Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup.

> Ct. Rep. 561, Ann. Cas. 1917 C, 522; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973.

See also MUNN *v.* ILLINOIS, 94 U. S. 113 (1876); TOWNSEND *v.* YEOMANS, 301 U. S. 441 (1937) (rates for handling grain and tobacco, respectively.)

In BALDWIN *v.* SEELIG, 294 U. S. 511 (1935) it was held that the State of New York cannot fix the price to be paid by New York milk dealers to Vermont farmers for milk sold by such dealers in New York which has been produced and purchased in Vermont, either directly or by prohibiting resale in New York. The present case is quite different, for Pennsylvania (the legislating state herein) is in the factual position of Vermont instead of New York. In BALDWIN *v.* SEELIG one state (New York) legislated for the inhabitants of another (Vermont), **the very action condemned and feared by the framers of the Constitution.** In the present case, Pennsylvania is instead applying the very remedy suggested in BALDWIN *v.* SEELIG:

> New York has no power to project its legislation into Vermont by regulating the price of milk to be paid in that state for milk acquired there (521).
>
> If farmers or manufacturers in Vermont are abandoning farms or factories or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy (524).

Squarely in accord with the above rule, see SLIGH *v.* KIRKWOOD, 237 U. S. 52 (1915) (quoted below);

NEW MEXICO *v.* DENVER & RIO GRANDE R. Co., 203 U. S. 38 (1905); and see MUNN *v.* ILLINOIS, 94 U. S. 113 (1876).

Thus, although it is beyond the police power of New York State to protect Pennsylvania (or Vermont—Baldwin v. Seelig) producers, the four cases above cited hold that Pennsylvania may exercise its police power to give its own producers police protection notwithstanding that the purchaser of their supply ships extra-state.

Therefore it only remains to determine whether the valid police regulations under discussion, or any one of said regulations (the statute being severable) violate the interstate commerce clause.

III. The Milk Control Board Law Does Not Violate the Interstate Commerce Clause.

A. THE STATUTE PRESENTS NO BARRIER TO COMMERCE BETWEEN STATES

It is now necessary to apply the second test expressed upon page 14 supra: **does the statute in the instant case create an economic barrier between states or otherwise discriminate against interstate commerce?** This is the practical approach, the realistic test to be applied under the recent decisions in order to determine whether the present statute falls within the earlier cases held merely to "indirectly" or "incidentally" affect interstate commerce, or rather within those held to "burden", "unduly burden" or "directly affect" such commerce. In this connection it is

reiterated that the three statutory requirements herein involved are severable; that the (1) licensing; (2) bonding and (3) price provisions should be judged upon the individual merits of each requirement; by stipulation (R. 15) it is agreed that if any single requirement is valid, judgment shall be entered for the plaintiff petitioner.

It is submitted that the "Granger Cases", MUNN *v.* ILLINOIS, 94 U. S. 113 (1876) and later cases based thereon, hereafter noted, are ample authority for the petitioner's contention that the present statute is consistent with the interstate commerce clause.

In the granger cases, as in the case at bar, the business is one affected with a public interest: prevention of fraud and imposition upon farmers, and promotion of public welfare, are the impelling reasons for legislation prescribing (1) licenses, (2) bonds and (3) rates for operators of grain elevators. These reasons, as well as protection of health, also support the legislation here under attack; see above. In every case, **the legislating state is an exporting state,** rather than an importing state.

The activities of warehouses which collect grain for the purpose of shipping such grain in interstate commerce are in every essential respect (except that milk must be refrigerated) identical with the activities of the defendant in the case at bar, who collects milk instead of grain for the purpose of shipping it in interstate commerce. In both instances the farmer is virtually at the mercy of the purchaser or shipper in

the grading, weighing and shipping of his supply. That milk is more perishable than grain, and must therefore move daily without fail, is a difference which would tend to strengthen rather than weaken the analogy. The reasons prompting application of the instant statute to all buyers of milk, including those shipping in interstate commerce, are probably more pressing (in view of the perishable character of the commodity) than the reasons advanced in the grain cases.

It will be observed that the producer and seller of grain may at least hold on to his commodity an extra day, week or month, in the event that he is dissatisfied with the purchaser and warehouseman thereof, with the price or storage rate that he is to receive or pay, with the grading or with the accounting therefor. On the other hand, the producer of fluid milk has no such opportunity to seek another purchaser because the perishable character of his commodity necessitates that he sell his milk immediately, waste it or drink it himself.

Furthermore, if a purchaser of grain fails to pay for it there is a possibility that he at least has the grain, against which some process may issue upon action by the producer seeking to recover payment therefor. This, however, is hardly the case in the relationship between the producer and milk dealer. The dealer does not, in fact cannot, hold on to a supply of milk because of its perishable character and because of the nature of the milk business. Therefore, the producers of the milk have far less opportunity to issue process

against the commodity than in the case of the grain growers.

Because only daily quantities are accumulated, milk receiving stations such as that of the defendant herein (R. 13) are small and the equipment inexpensive, whereas grain warehouses may be larger and more costly. Hence the tendency towards fly-by-night handlers is greater in the case of milk than in the case of grain.

The tendency toward monopoly is as great among milk handlers as among grain handlers; and in both instances prices are subject to transactions at distant exchanges: Reports of the Federal Trade Commission, cited note 6, supra; see also Summary Report, submitted to the Congress January 4, 1937; ROHRER *v.* MILK CONTROL BOARD, 322 Pa. 257 (1936), at 265.

Both the grain grower and milk producer dispose of their commodity in a transaction which takes place at the established place[11] of business conducted by the warehouseman or milk dealer within the state, the identity of and title to the farmer's supply being lost

[11] Milk dealers in the 16 Pennsylvania counties included in the New York milkshed purchase monthly 59,840,000 pounds of milk from producers, of which 57,187,000 pounds are shipped monthly mainly to points in Pa. or N. Y. through receiving stations or receiving plants such as the present defendant's. The difference is used **within** the counties; the milk is **not** delivered or sold to persons outside the area involved **except through such plants.** (This is to be expected since milk must be cooled and handled through such plants in order to be shipped distances without spoiling and economically). Cowden and Fouse, Supply and Utilization of Milk in Pennsylvania (Pa. State College, 1936) Bulletin No. 327, Tables V, VIII (data based upon month of April, 1934). This survey was published subsequently to the preparation of the agreed facts herein (R. 13) which estimated that 470,000,000 pounds of milk are annually shipped to other states (R. 14); the survey, however, shows 50,616,000 pounds of milk monthly as the accurate figure (Table 47).

there as well. In both instances (1) the commodity is produced within the state, (2) title passes within the state (3) to a purchaser within the state (4) operating a plant within the state (5) at which plant the commodity is weighed, graded, etc., and (6) stored for shipment, (7) thence shipped extra-state.

In both instances, the (1) license, (2) bond and (3) rate is with respect to the transaction between the producer and the operator of the plant within the state. **In neither instance does the requirement attach to the transaction between the operator and the person in the other state to whom he resells**—condemned in HIGHLAND FARMS DAIRY, INC. *v.* AGNEW, 300 U. S. 608 (1937), and BALDWIN *v.* SEELIG, 294 U. S. 511 (1935).

In view of the similar character of the relationship between producers and handlers of grain and those of milk, it is beyond dispute that similar provisions for the (1) licensing and (2) bonding of persons operating gathering stations for these commodities have the same police purpose and a similar effect upon interstate commerce. The severability of these requirements in the instant case has already been noted.

In comparing grain handling rates with milk prices, the similarity of their effect upon interstate commerce may be less obvious; but the analogy is almost as strong, and neither is more burdensome than the other. If storage rates are prescribed too low, interstate commerce will be impeded in the same manner as though grain prices (or milk prices) are prescribed

too high. If a maximum rate prescribed for warehouse charges is too low warehousemen will go out of business and grain shipment in interstate commerce would become impossible. Similarly, if minimum producer prices are prescribed too high for milk shipped in interstate commerce, such shipments would cease. The effect of the law upon interstate commerce is identical in both situations. Neither is a greater barrier or impediment to interstate commerce than the other.

In truth, the fifth and the fourteenth amendments of the Constitution of the United States are designed to protect warehousemen and milk dealers from rates or regulations which are confiscatory. The remedy lies there, but not within the interstate commerce clause.

Let us examine the granger cases:

MUNN *v.* ILLINOIS, 94 U. S. 113 (1876) arose upon information filed against certain warehousemen for transacting business without a license. Salient features of the Illinois statute involved are described at page 137:

> * * * The Act prescribed the maximum of charges which the proprietor, lessee, or manager of the warehouse was allowed to make for storage and handling of grain, including the cost of receiving and delivering it, for the first thirty days or any part thereof, and for each succeeding fifteen days or any part thereof; and it required him to procure from the circuit court of the county a license to transact business as a public warehouseman, and to give a bond to the people of the State in the penal sum of $10,000 for the faithful per-

> formance of his duty as such warehouseman of the first class, and for his full and unreserved compliance with all laws of the State in relation thereto. The license was made revocable by the circuit court upon a summary proceeding for any violation of such laws. * * *

Thus, the statute there under attack involved the very requirements of the Pennsylvania Milk Control Law now at issue, to wit, (1) licensing, (2) bonding, (3) paying prescribed charges. The question was squarely raised as to whether the statute under consideration conflicted with the power of Congress to regulate interstate commerce. Said the Court, per Mr. Chief Justice Waite, at page 135:

> We come now to consider the effect upon this statute of the power of Congress to regulate commerce.
>
> It was very properly said in the case of the State Tax on R. Gross Receipts, 15 Wall., 293, 21 L. ed., 167, that "It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."
>
> The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government

> over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.

Earlier the Court had stated (134):

> The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied.

BRASS *v.* STATE OF NORTH DAKOTA, 153 U. S. 391 (1894) involved the constitutional validity of the act of North Dakota, which (as that in the present case) prescribed (1) licensing, (2) bonding, and (3) rates for operators of elevators or warehouses where grain or other property was stored for compensation. The statute was described (at 399) as requiring "that those who conducted such public warehouses located in cities containing not less than one hundred thousand inhabitants should procure licenses and should give bond conditioned for compliance with the law; prescribe maximum rates for storage and handling grain; and declared certain penalties for the failure to procure licenses." This court, relying upon MUNN *v.* ILLINOIS, supra, and PEOPLE *v.* BUDD, 143 U. S. 517 (1892), sustained the constitutionality of the North Dakota statute. Said the Court, in holding that the act did not violate the interstate commerce clause (at 405):

> * * * We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehouses engaged in elevating and storing grain for profit, denies to the

> plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the states. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one.

W. W. CARGILL CO. *v.* STATE OF MINNESOTA, 180 U. S. 452 (1900) was an action identical with the present, to wit, an action by the state to enjoin the operation of an elevator-warehouse until the defendant procured a license under a Minnesota statute, which required owners of such warehouses to (1) procure a license, (2) charge certain rates, (3) keep certain records, (4) use certain methods. This statute made it "unlawful to receive, ship, store or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license" (pages 459, 460). The statute directed a state railroad and warehouse commission to prescribe rates of charges for the receipt, storage, handling and shipment of grain therein and therefrom. Persons operating warehouses were required to keep a "true and correct account in writing, in proper books, of all grain received, stored and shipped at such elevator or warehouse," stating the weight, grade and dockage, etc. Methods of grading and the issuance of warehouse receipts were also regulated, and certain reports to the Commission prescribed. Said a unanimous Court (at 468, 470):

> * * * We cannot question the power of the state, so far as the Constitution of the United States is

concerned, to require a license for the privilege of carrying on business of that character within its limits,—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation. * * *

* * * * * * *

It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has intrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license.

MERCHANTS EXCHANGE OF ST. LOUIS *v.* STATE OF MISSOURI, 248 U. S. 365 (1919) arose upon a writ of error to review a judgment ousting a board of trade from the power of weighing grain received into and discharged from public warehouses and elevators, and of issuing of certificates and making charges for such services. A statute of Missouri required weighers to be (1) licensed, and (2) bonded; it prohibited any person from issuing weight certificates, or charging for weighing "other than a duly authorized and bonded state

weigher." Said the Court, in a unanimous opinion, per Mr. Justice Brandeis:

> * * * The regulation of weights and measures with a view to preventing fraud and **facilitating commercial transactions,** is an exercise of the police power. * * * (Boldface ours)
>
> Second, Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the state, burdens interstate commerce. It clearly does not. Pittsburgh & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 16 Sup. Ct. Rep. 459; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423. * * *

BUDD *v.* STATE OF NEW YORK, 143 U. S. 517 (1892) arose upon an indictment against the manager of an elevator and warehouse for receiving and discharging grain in the City of Buffalo, New York, and charging an excessive rate therefor. In this case the Supreme Court, per Mr. Justice Blatchford, not only adopted relevant portions of the opinion in Munn v. Illinois, supra, in sustaining the New York statute as a proper exercise of the state police power, but also held the statute consistent with the interstate commerce clause, as follows:

> So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the State of New York. It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in Munn v. Illinois. It is of

> the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State and other kindred laws.

It was conceded, and the Court found, (at 544-545) as follows:

> In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

In summary of the granger cases, it is found that the statutes required (1) licensing, (2) bonding, and (3) payment of certain rates in Munn v. Illinois, and Brass v. North Dakota. The statutes required (1) licensing, and (2) bonding in Merchants Exchange v. Missouri; (1) licensing, and (3) payment of certain rates, in Cargill v. Minnesota; and (3) payment of certain rates in Budd v. New York. In all cases the language of the Court was sufficiently broad to justify the conclusion that none of the three requirements, taken together or singly, violated the interstate commerce clause. These cases were discussed, approved and followed by this Court as recently as TOWNSEND

v. YEOMANS, 301 U. S. 447 (1937) (tobacco handling rates).

The granger statutes—and the Milk Control Board Law—do not violate the interstate commerce clause because (applying the required tests) they create no economic barrier between states, and do not otherwise discriminate against such commerce. In fact, these acts **promote and encourage** interstate trade, because this is the inevitable effect of laws which protect persons from fraud, imposition and unfair trade practices.

Of special importance is this with respect to milk producers, who, by such protective laws, are encouraged to ship their milk long distances to city dealers whom they do not know or see, rather than accept the convenience and safety attendant to selling their supply locally: PEOPLE *v.* PERETTA, 253 N. Y. 305 (1930).

Certainly legislation encourages commerce which tends "to eliminate irresponsible and dishonest dealers": the court below (R. 33); and which is "stabilizing" an industry hitherto fraught with "unhealthful, uneconomic, deceptive and destructive practices": legislative findings in Preamble to Act of April 28, 1937, P. L. 417, and Appendix. "The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat [or venditor] emptor should not be relied upon to reward fraud and deception * * * practices contrary to decent business standards," FEDERAL TRADE COMMISSION *v.* STANDARD EDUCATION SOCIETY, 58 S. Ct. 113 (1937) at 115.

If the granger laws—and the Milk Control Board Law—prevented a commodity from being taken out of the state, the cases would be different. Such prohibition is obviously a barrier to trade, especially where the legislature has the purpose to retain resources for the benefit of the inhabitants of its state; the Constitution was never intended to permit one group of citizens selfishly to get such advantage over another merely by virtue of state boundaries: WEST *v.* KANSAS NATURAL GAS CO., 221 U. S. 229 (1911); PENNSYLVANIA *v.* WEST VIRGINIA, 262 U. S. 553 (1922).

The attitude of the Court is quite different where such conservation statutes are not prohibitory, but rather regulatory: THOMPSON *v.* CONSOLIDATED GAS UTIL. CORP., 300 U. S. 55 (1937); CHAMPLIN REFINING CO. *v.* CORPORATION COMMISSION, 286 U. S. 210 (1932); the Indiana decision of JAMIESON *v.* INDIANA, ETC. CO. approved in WEST *v.* KANSAS NATURAL GAS CO., 221 U. S. 229 (1911) at 257.

However, instead of being purposed to retain, and retaining, grain or milk for the inhabitants of the state (thus prohibiting commerce), the granger laws and the Milk Control Board Law are purposed to, and do, promote sales in honest commerce. Laws with such effect are sustained even where prohibitory (rather than regulatory) as in SLIGH *v.* KIRKWOOD, 237 U. S. 52 (1915):

> A statute of the state of Florida undertakes to make it unlawful for any one to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.
>
> * * * * * * *

That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the state, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the state in the matter of local regulation, which the state may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729.

While this proposition seems to be conceded, and the competency of the state to provide local measures in the interest of the safety and welfare of the people is not doubted, although such regulations incidentally and indirectly involve interstate commerce, the contention is that this statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other states who may receive the fruits from Florida in a condition unfit for consumption; and however commendable it may be to protect the health of such foreign peoples, such purpose is not within the police power of the state.

The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of

persons or property of the public or any individual within the state. New York v. Miln, 11 Pet. 102, 139, 9 L. ed. 648, 662. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health * * *.

Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state. * * *

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

* * * * * * *

> * * * Therefore until Congress does legislate upon the subject, the state is free to enter the field. Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Instead of constituting such prohibition upon exportation, the granger laws and the present law are merely reasonable police regulations thereof (in instances where the Federal Government has not acted). Such regulations do not barricade trade, but facilitate it. It is so held whether the producer protected is the one in the importing state who buys therein, as in PATAPSCO GUANO CO. *v.* BOARD OF AGRICULTURE, 171 U. S. 345 (1898) and NATIONAL FERTILIZER ASSN. *v.* BRADLEY, 301 U. S. 178 (1937) (fertilizer cases); or the one in the exporting state who sells therein, as in the case at bar, NEW MEXICO *v.* DENVER & RIO GRANDE R. CO., 203 U. S. 38 (1905), and SLIGH *v.* KIRKWOOD, supra.

The cases are legion where the legislative purpose is to protect the health of the public from diseased commodities: MINTZ *v.* BALDWIN, 289 U. S. 346 (1933). But the law is no different where the commodity is wholesome and merely deceptively inferior: HEBE CO. *v.* SHAW, 248 U. S. 297 (1919). In fact, the law is the same even where the commodity is totally unrelated to health, but merely susceptible of fraud and imposition: PURE OIL COMPANY *v.* STATE OF MINNESOTA, 248 U. S. 158 (1918); HALL *v.* GEIGER-JONES CO. 242 U. S. 539 (1917); and the fertilizer cases, supra. Similarly, where no commodity is involved, but where nevertheless the statute is designed to prevent fraud and imposition; MAYOR ETC. OF NEW YORK *v.* MILN, 11 Pet. 102, 9 L. ed. 648 (1837).

All of the foregoing cases require adherence to certain standards in the producing, buying, selling or delivering of an article of commerce, which standards may attach either to the article itself, or to the conduct of the dealer therein; and this whether importation or exportation. A few fall within the state laws commonly sustained as "inspection"[12] or "quarantine" measures. But here again there is no magic in words, because, even in each case where the law was sustained, it "in its practical workings necessitates State treatment of phases of interstate commerce" nevertheless: FRANKFURTER AND LANDIS, THE COMPACT CLAUSE OF THE CONSTITUTION, 34 Yale Law J. (1925) 724. The important thing is that applying our practical test, in none of these cases is commerce from one state barricaded by another; rather it is encouraged. On the other hand, in the cases where a barrier was created, particularly by an importing state, the law was stricken down. It is submitted that no barricade exists in the granger cases or in the instant case.

B. THE STATUTE DOES NOT OTHERWISE DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Does compliance with the present statute erect an unconstitutional barrier against interstate commerce in any manner not hitherto discussed? There is no indication that the cost, or other regulation, exceeds that in the granger cases; and certainly no evidence that the cost or other regulation is excessive. There are three (3) main items involved in the present case:

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[12] In many aspects, the present law is an inspection law, particularly regarding the examination of books and records to verify that producers are correctly paid: Sections 8, 15, 16.

1. LICENSE: The license fees are merely contributions, varying with the size of the dealer, toward a special fund (section 17) for administering the statute. It is a costly task, for example, to examine the records of over 1,000 dealers to ascertain that nearly 80,000 milk producers are being paid accurately and promptly for 4 billion pounds of milk annually; Cowden and Fouse, supra, note 11, tables 4, 6. Under such circumstances a reasonable fee never violates the interstate commerce clause: PURE OIL COMPANY *v.* STATE OF MINNESOTA, 248 U. S. 158 (1918) and the many citations therein. Interestingly enough the defendant herein is assessed a fee of zero dollars, because Section 11-E[13] of the statute permits deduction of his entire supply, shipped to New York. The law certainly is not a revenue law; compare CHASSANIOL *v.* GREENWOOD, 291 U. S. 584 (1934).

It should be especially noted that the requirement of a license herein is to be judged by the principles above, applicable to police regulations. If the requirement were imposed solely by virtue of non-residence, having no other purpose, the result would be different, as in DAHNKE-WALKER MILLING CO. *v.* BONDURANT, 257 U. S. 282 (1921), where also the corporation had no plant and delivery was made to the carrier.

2. BOND: In the first place the law herein merely requires a personal bond, which generally costs nothing. Secondly, even if a corporate surety were required, the state courts have already determined that such bonds are reasonably obtainable; see Appendix

[13] Section 11-E. "Milk sold and distributed outside of this Commonwealth in any state which charges a license fee of milk dealers shall not be included in the determination of the amount of the license fee, provided that such milk is actually computed in determining the amount of such license fee in such other state." * * *

A. Thirdly, the cost of obtaining a bond in compliance with a valid exercise of the state police power does not violate the interstate commerce clause: ERIE RAILROAD Co. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS, 254 U. S. 394 (1920), quoted infra; MISSOURI PACIFIC RY. Co. *v.* NORWOOD, 283 U. S. 239 (1930); see also the granger cases supra, and HARTFORD ACCIDENT AND INDEMNITY Co. *v.* ILLINOIS, 298 U. S. 155 (1936).

3. PRICE: According to the agreed statement of the case, the defendant herein would be required to pay producers a higher price for milk under the law than otherwise (R. 15). We are not here dealing with a tax or revenue measure, as in EUREKA PIPE LINE Co. *v.* HALLAHAN, 257 U. S. 265 (1921). Nor is a state here attempting to fix a price for bringing milk from another state, as in BALDWIN *v.* SEELIG, 294 U. S. 511 (1935), discussed supra; or persons from another state, as in COVINGTON & CINC. BRIDGE Co. *v.* KENTUCKY, 154 U. S. 204 (1893); these are the clearest instances of one state erecting a barrier against another.

Furthermore, neither is the state fixing a price for milk delivered at the state line or in another state for use in another state, as in PUBLIC UTILITY COMMISSION *v.* ATTLEBORO STEAM & ELEC. Co., 273 U. S. 83 (1927) (electricity); see also HIGHLAND FARMS DAIRY INC. *v.* AGNEW, 300 U. S. 608 (1937) at 616. In the present case the state is simply fixing the price of milk produced, sold and delivered by producers in the state to the defendant, a dealer with an established place of business also in the state; if he must pay a higher sum for the raw product, it increases his cost of doing

business within the state, just as where a higher sum was required to be paid for labor within the state in MISSOURI PACIFIC RY. CO. *v.* NORWOOD, 283 U. S. 239 (1930); and for abolishing grade crossings within the state in ERIE RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS, 254 U. S. 394 (1920), quoted below. In the present case, there is little danger of a trade barrier being erected, because if the price of milk is prescribed too high the local plants of interstate dealers will be driven out of the state and our own Pennsylvania farmers will lose their market. In any event, nothing could be clearer than the following vivid statement of the law in the Erie (supra) case:

> * * * That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 246, 63 L. ed 958, 962, 39 Sup. Ct. Rep. 450. * * *

Of course, the Milk Control Board may some day issue some order or regulation involving the defendant, which may have the effect of violating the interstate commerce clause; or it may be that some statutory provision hitherto not invoked against the defendant will be inconsistent with the clause. But this is a question which can be presented some future day. In CARGILL COMPANY *v.* STATE OF MINNESOTA, 180 U. S. 452 (1901) it was held:

> * * * A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings. * * *

The Court observed (465): "There are, perhaps, provisions in the act which it would be unconstitutional to apply" to the defendant, "But these matters need not be considered at this time." To the same effect see HIGHLAND FARMS DAIRY INC. *v.* AGNEW, 300 U. S. 608 (1937).

Perplexing problems of administration may arise, but even the most extreme can be met when and if they confront the board or the courts: LONE STAR GAS Co. *v.* TEXAS, 82 L. ed. 884 (1938).

Having submitted that the statute herein presents no barrier to commerce between the states, it is next necessary to inquire whether there is any other discrimination against such commerce. A negative answer is apparent from the Agreed Statement of Case (R. 13), which points out (Paragraph 12, R. 14) that over 4 billion pounds of milk within Pennsylvania is subject to the present statute, as well as the defendant's supply. According to the recent survey de-

scribed above, 90.3% of all milk handled by Pennsylvania dealers was either purchased from producers (82.2%) or produced by the dealers' own herds (8.1%); and only 15% of all milk handled from all sources is exported; see Cowden and Fouse, supra, note 6, Tables 4, 47. However, even if all the milk were exported, the statute would not necessarily be regarded as discriminatory: TOWNSEND *v.* YEOMANS, 301 U. S. 447 (1936); because it is designed to, and does, affect **all** commerce in milk, regardless of where the chips fall: SOUTH CAROLINA *v.* BARNWELL BROS., 303 U. S. 177 (1938).

Thus, the present statutory provisions are quite different from the requirement in BALDWIN *v.* SEELIG, 294 U. S. 511 (1935), which expressly applied solely to "milk produced **outside of the State**" (footnote 1, at 519); see discussion above, page 27. This statutory requirement was amended out of the previous Pennsylvania law by section 18-G of the present statute. Furthermore, the present case is quite different from DI SANTO *v.* PENNSYLVANIA, 273 U. S. 34 (1927) wherein the statute applied **solely** to steamship tickets for **foreign commerce**; this case is further discussed below.

It is respectfully submitted that by virtue of the nature of the dairy industry, and the purpose and effect of the present statute with respect thereto, its application to the defendant does not create a barrier or otherwise discriminate against interstate commerce; that, under all the authorities, the law is consistent with the interstate commerce clause; that therefore it remains effective until superseded by valid Federal regulation.

C. The Opinions Below: Cases Distinguished

The opinions of the courts below are based upon the following decisions of this Court: Lemke *v.* Farmers Grain Co., 258 U. S. 50 (1922); Shafer *v.* Farmers Grain Co., 268 U. S. 189 (1925); and Di Santo *v.* Pennsylvania, 273 U. S. 34 (1927).

The Lemke and Shafer cases are the only granger cases not earlier discussed herein. Let us now apply to these cases the tests described above, page 14.

In Lemke *v.* Farmers Grain Co., 258 U. S. 50 (1922) the opinion of this Court pointed out that, "The grain can only be purchased subject to the power of the state grain inspector to determine the margin of profit which the buyer shall realize upon his purchase." "Margin of profit" was defined to be "the difference between the price paid at the North Dakota elevator and the market price, with an allowance for freight, at the **Minnesota** points to which the grain is shipped and sold" (57).

No standard whatever was prescribed whereby the state officer could determine the reasonableness of the margin which was to be permitted; no provision was made that a fair return be allowed upon the volume of business handled in terms of dollars, or upon the value of property used and useful, or upon any other basis. On the other hand, an extra-state market, and an extra-state price was the only express requirement to be considered in the determination of reasonable margins. Hence there was no holding to the effect that the State of North Dakota had enacted a statute with-

in the valid exercise of the state police power. The case turned entirely upon the holding that the statute "enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce" (59). This much is certain: the North Dakota statute authorized a state officer to perform the legislative function of rate making, delegating to him the power so to do in a manner which violated due process (failing to meet the first test), and prescribing extra-state factors as the **only** standard for him to consider (failing to meet the second test). It is not surprising that the majority of this Court determined the statute therein to be violative of the interstate commerce clause.

The dissenting opinion held that the statute was at least in part a proper exercise of the state police power; that it was severable; and that therefore the interstate commerce clause was not violated, regardless of "whether the purchases involved in this case were intra-state or inter-state commerce" (64).

So far as concerns the licensing and other provisions of the North Dakota statute, the majority of the Court held that without the price-fixing provisions "the state legislature would not have passed the act" (60), and therefore set aside the entire statute. This conclusion cannot be reached in the case at bar because Section 22 of the Milk Control Law of 1935, and Section 1201 of the Milk Control Law of 1937 (which repealed and reenacted the former) express the clear intention of the legislature that the provisions thereof are severable. Hence, both opinions in the Lemke case are,

at the very least, authority for the (1) licensing, and (2) bonding provisions of the case at bar.

It is submitted that Lemke v. Farmers Grain Co. was correctly decided as to result upon the price requirement. This is strongly intimated in a unanimous decision of this court: TOWNSEND *v.* YEOMANS, 301 U. S. 441 (1937). The latter case distinguished the former solely by pointing out the definition of margin or profit, and holding that therein "the state officer was thus authorized to 'fix and determine the price' to be paid for grain which was **'bought,** shipped, and **sold** in interstate commerce'. That the provision was a regulation of interstate commerce was said to be 'obvious from its mere statement' " (458); it has already been pointed out that the Lemke case required price-fixing "at the Minnesota [extra-state] points to which the grain is shipped and sold". This Court has determined time and again that such regulation of extra-state business has an effect upon persons beyond the (legislating) state which tends toward the trade barriers condemned by the framers of the Constitution: HIGHLANDS FARMS DAIRY INC. *v.* AGNEW, 300 U. S. 608 (1936); BALDWIN *v.* SEELIG, 294 U. S. 511 (1935); PUBLIC UTILITY COMMISSION *v.* ATTLEBORO STEAM & ELEC. Co., 273 U. S. 83 (1927); COVINGTON & CINC. BRIDGE Co. *v.* KENTUCKY, 154 U. S. 204 (1893). In the case at bar we are not regulating the defendant's dealings with extra-state persons, but rather his dealings with the producers selling to him in the same state where they, the legislature, he and his plant are situated.

SHAFER *v.* FARMERS GRAIN CO., 268 U. S. 189 (1925) held invalid a later statute of the State of North Dakota, which excluded the price-fixing provision of the former law held invalid in the Lemke case. The majority opinion of the Court contains the following passage in the Shafer case, at 200:

> That it is designed to reach and cover buying for interstate shipment is not only plain but conceded.

This certainly is not conceded by your petitioner in the case at bar: see argument supra. Another vital difference between the two cases lies in the fact that **Congress had already occupied the field** sought to be controlled by the North Dakota legislature. In fact, the two fields were so identical that the state contended in the Shafer case that this statute was merely an inspection regulation "to assist in carrying out the purposes of the United States Grain Standards Act" (202). However, this Court determined that, "We find little in the said act to support, and much to refute, the assertion that it is merely an attempt to carry out the purposes of the federal act" (203). In fact, Gavit, INTERSTATE COMMERCE (1932), 244, 261, interprets this case as having turned upon the fact that Congress had occupied the field (although one cannot deny that the opinion adheres to the logic expressed in the Lemke case). It is certain that this Court was shocked by a state statute which added to prior regulation imposed upon an industry by Congress; and, as was said in SOUTH CAROLINA *v.* BARNWELL BROS., 303 U. S. 177 (1938) (footnote 4) "an unnecessarily harsh restriction" will be held unconstitutional. Such double regulation does not appear in the present case. Such regulation is, indeed, a trade barrier.

If any other view were taken with regard to the Lemke and Shafer cases, they would conflict with MUNN *v.* ILLINOIS, supra, and the other granger cases. Then it would become pertinent to reiterate that TOWNSEND *v.* YEOMANS, 301 U. S. 441 (1937) discussed, approved and followed the latter cases quite recently, and merely "distinguished" the former.

The Supreme Court of Pennsylvania held that the instant case was controlled by DI SANTO *v.* PENNSYLVANIA, 273 U. S. 34 (1927). However, this case merely involved the validity of a statute requiring licenses to sell steamship tickets **to or from foreign countries.** This necessarily involved regulation of foreign commerce and foreign commerce only, the type of discriminatory legislation condemned by this Court as recently as SOUTH CAROLINA *v.* BARNWELL BROS., supra; the barrier thus created is identical to that in COVINGTON & CINC. BRIDGE CO., *v.* KENTUCKY, (and other cases, supra, pages 12, 53) wherein was condemned a statute fixing bridge tolls to and from another state.

It is interesting to observe that the majority opinion in the Di Santo case also relies upon SHAFER *v.* FARMERS' GRAIN CO., 268 U. S. 189 (1924), wherein the opinion shows that counsel expressly "conceded" that the statute was "designed" to affect interstate commerce. This case is more fully distinguished above.

The majority opinion in the Di Santo case held that it was controlled by TEXAS TRANSPORT & TERMINAL CO. *v.* NEW ORLEANS, 264 U. S. 150 (1924), and MCCALL *v.* CALIFORNIA, 136 U. S. 104 (1889), yet both of the latter

cases were tax cases, wherein appears not the slightest discussion of State police power.

In the case at bar the legislation constitutes no effort to regulate only milk dealers in interstate commerce; therefore it is entirely distinguishable from the Di-Santo case. Furthermore, in the case at bar it has never been contended that the license fee constitutes a tax, and it in fact is not a revenue producing measure (see page 46, supra); therefore it is entirely distinguishable from the Texas Transport and McCall cases.

It is also pertinent to note that the evils to be remedied in the Di Santo case were, in a sense, national in scope: ignorant foreigners, susceptible to fleecing by dealers in foreign steamship tickets, are no less susceptible because they are in one state rather than another. Furthermore, enforcement of such laws would often involve dealing with foreign governments, a matter of national concern. In the present case, however, the relation of producer to dealer depends entirely on the nature of the industry in the particular resale market or production area, and may vary with the business cycle, the amount of rainfall, the distance from market, or the plane of business practice in the community. Indeed, the Di Santo problem differs from the milk problem because the latter (1) is local in the sense that it invites and necessitates diversity of treatment; and (2) involves a business "affected with a public interest."

The Di Santo case must be limited to its specific facts as a foreign commerce barrier, in view of the

many cases sustaining (1) licensing, and (2) bonding, which affect interstate commerce. Many such licensing and permit cases have already been cited, entirely aside from the Granger cases. These may be designed to protect the safety of the public, as in SMITH *v.* ALABAMA, 124 U. S. 465 (1888); or their right to freedom from fraud and imposition, as in NATIONAL FERTILIZER ASSOCIATION *v.* BRADLEY, 301 U. S. 178 (1937). Call these "inspection" laws, as one may: so is the present law, which subjects the books and records of milk dealers to examination for determining whether producers are fully paid, and paid promptly, for all the milk they deliver as properly weighed, graded, tested and classified according to use; see Appendix A, page 74; and supra, page 21.

If persons may be so licensed by law, then they can also be bonded as a means of enforcing the law. Of what other purpose could the bond be? HARTFORD ACCIDENT AND INDEMNITY CO. *v.* ILLINOIS, 298 U. S. 135 (1936) (bonding of produce dealers) speaks volumes in support of the fact that the Di Santo decision is not conclusive of the bonding requirement herein. True, in the Hartford case the bond was required by the importing state rather than the exporting (as here) state. But this can make no difference, if bonding constitutes a trade barrier: compare PATAPSCO GUANO CO. *v.* BOARD OF AGRICULTURE, 171 U. S. 345 (1898) with NEW MEXICO *v.* DENVER & RIO GRANDE R. CO., 203 U. S. 38 (1906); these are permit cases applied to imports and exports, respectively (fertilizers and hides), and the law could be no different respecting bonds designed to make such permit laws enforceable. The important thing is that both Illinois (the Hartford case) and

Pennsylvania (the instant case) are requiring bonds of persons in their own state, and not of persons in other states; nor do the laws expressly operate solely upon a commodity inextricably part of foreign commerce (Di Santo case): and in both instances honest commerce is promoted, as in the granger cases. Furthermore, the Hartford case (where the dealer imported) was recently cited as authority in the unanimous decision of TOWNSEND *v.* YEOMANS, supra (where the warehouseman exported).

It is submitted that the instant case is controlled not by the Di Santo decision (and by those cases on which it is based), but rather by MUNN *v.* ILLINOIS and the line of authorities succeeding it.

If the Supreme Court of Pennsylvania correctly relied upon DI SANTO *v.* PENNSYLVANIA, 273 U. S. 34 (1927), it is respectfully submitted that reconsideration thereof by this Court at this time is necessary and desirable from a legal, social and economic point of view. It was decided by a divided court, Mr. Justice Brandeis, Mr. Justice Stone and the late Mr. Justice Holmes dissenting. The opinion of the majority was in turn based upon tax cases decided by a divided court, including MCCALL *v.* CALIFORNIA, 136 U. S. 104 (1889), of which Mr. Justice Brandeis, dissenting, asked "disregard" because this "would involve merely refusal to repeat an error once made" (273 U. S. 34, at 41). In Di Santo *v.* Pennsylvania, supra, this Court reversed the Supreme Court of Pennsylvania, the opinion of which appears in 285 Pa. 1 (1923); and yet in the instant case the Supreme Court of Pennsylvania reasserts belief in its original opinion, stating, "We

have felt, and still feel that" the present type of police regulation is "peculiarly within the State's domain."

Since the decision of this Court in the Di Santo case, many changes have taken place. There has come a recognition that the lives of the citizens of the United States are not limited by the boundaries of the States wherein they reside; that activities in one State often necessarily affect activities in another. Especially is this true in the milk industry, wherein milksheds have developed according to natural markets rather than according to State lines. Yet the problem is not national in scope because every milkshed has its own problems. In the few years since the decision of the above case, a pronounced change has occurred in the fields of legal and social thought, arising from the recognition that many problems of human endeavor cannot be aided or solved except by action which accepts that State lines must be crossed. Is the only alternative intervention by the Federal Government? Under the Di Santo case the answer is apparently in the affirmative, even with respect to licensing and bonding. But under MUNN *v.* ILLINOIS and its succeeding cases, including the Hartford case, the answer is clearly that the State may act until Congress see fit.

It is submitted that the realities of trade under today's conditions compel the conclusion that, unless restricted to the peculiar facts, the result of the Di Santo case was unsound particularly as applied to business affected with a public interest.

IV. The Statutory Requirements Herein Have Not Been Superseded by Federal Regulation.

(1) Licensing; (2) Bonding: Congress has not required or authorized licensing or bonding of milk dealers, though it has imposed such requirements upon dealers in fresh fruit and vegetables (Act of June 10, 1930, c. 436, 46 Stat. 541, as amended; 7 U. S. C. A. Sec. 499); upon motor carriers (Act of Aug. 9, 1935, c. 498, 49 Stat. 543; 49 U. S. C. A. Sec. 302); and many others.

(3) Price: So far as concerns the price of milk handled in interstate commerce, the Congress has authorized regulation by the Secretary of Agriculture in his discretion regarding certain milk under restricted circumstances, and where certain facts existed. (Act of Aug. 24, 1935, c. 641, 49 Stat. 753, as amended; 7 U. S. C. A. sec. 601). The need for such federal price regulation was impressed upon the entire nation by the consequences which followed in the wake of Baldwin v. Seelig, supra. A dramatic sequel thereto is the petition [14] addressed to the United States Department of Agriculture by seven State governments in 1935, seeking federal price regulation to take the place of the state price control (milk moving into the legislating state) invalidated by the Baldwin decision.

That Congress has power to regulate the price of goods handled in interstate commerce is manifest in CARTER *v.* CARTER COAL Co., 298 U. S. 238 (1936) (opinions by Mr. Chief Justice Hughes, at 319; and by Mr. Justice Cardozo, at 326). Such power was recognized by the unanimous view of this Court in BALDWIN *v.*

[14] See Appendix B.

SEELIG, 294 U. S. 511 (1935) at 522, to the effect that the interference with commerce therein at issue was "meant to be averted by subjecting commerce between the states to the power of the nation"; and by both opinions of this Court in PUBLIC UTILITY COMMISSION *v.* ATTLEBORO STEAM & ELEC. Co., 273 U. S. 83 (1927) wherein the majority held that rate regulation (of electricity moving across state lines) can "be attained by the exercise of the power vested in Congress" (at 90).

There certainly is no doubt that "The question of price dominates trade between the states," as this Court recognized in CHICAGO BOARD OF TRADE *v.* OLSEN, 262 U. S. 1 (1923), at 40. As long ago as MUNN *v.* ILLINOIS, 94 U. S. 113 (1876) the right of Congress to act (if it saw fit to do so) was never doubted. This Court held, at 134: "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied." Since Congress has the right to regulate interstate commerce the above authorities properly hold that it also has the right to establish charges therein. See also UNITED STATES *v.* BUTTRICK Co., 91 F. 2d 66 (1937).

The price of milk moving in interstate commerce is much more closely related to such commerce than the price of storage space or services in the handling, within a state, of the cows which produce such milk: TAGG BROS. & MOOREHEAD *v.* UNITED STATES, 280 U. S. 420 (1930); ACKER *v.* UNITED STATES, 298 U. S. 426 (1936). Similarly the price of milk moving in interstate commerce is more closely related to such commerce than

the labor, within a state, in handling it: NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP., 301 U. S. 1 (1937).

However, the record in the case at bar does not show any exercise of authority by the Secretary of Agriculture pursuant to the Act of August 24, 1935, c. 641, 49 Stat. 753, as amended (7 U. S. C. A. Sec. 601) either affecting the defendant or any part of the milk purchased by it. Furthermore, Congress has expressly directed the Secretary to **cooperate** with state authorities in the "formulation, administration, and enforcement of Federal and State programs": Act of 1935, supra, as amended June 3, 1937, c. 296, Sec. 1, 50 Stat. 246 (7 U. S. C. A. Sec. 610). Where there is such intention to cooperate with rather than to supersede state authorities, state regulation is not superseded: HARTFORD ACCIDENT & INDEMNITY CO. *v.* ILLINOIS, 298 U. S. 155 (1936); MERCHANTS EXCHANGE *v.* MISSOURI, 248 U. S. 365 (1919), in absence of actual conflict.

CONCLUSION

If the decision of the court below is the law of the land, the stabilization of the milk industry of the United States by means of milk control legislation and all commerce in milk will be greatly hindered. At least twenty States (practically all the dairy States) today have upon their statute books legislation of the necessary type involved in the instant case. Milk dealers in any State may evade all regulation by simply purchasing their milk at plants which they erect in other States, thus creating an area without law, to the detriment of dairy farmers, other dealers and the consuming public.

It is a matter of common knowledge that milk dealers with no assets in the State are able to, and do, in accordance with the custom of the trade, buy their milk on credit; if required to post neither license nor bond they would indeed have the farmers "at their mercy:" ROHRER *v.* MILK CONTROL BOARD, 322 Pa. 257 (1936), at 265. Hence it is most essential here to reiterate that the provisions of the statute at issue in this case are severable.

As stated above, only a small amount of the milk produced in Pennsylvania is shipped to other States; yet it is common knowledge that the malpractices of a minority can disrupt an entire industry. It is impossible to maintain fair dealings in an industry within a State for the benefit of the inhabitants of the State, if here and there a milk dealer can create an area without law merely because he ultimately resells the milk in some other State. (No attempt has been made to apply the present statute to any resales by the defendant). Such "no-man's-land" is increasing in area, not only within the Commonwealth of Pennsylvania but within all other States with milk control legislation, as milk dealers come more and more to realize that by crossing a State line they can evade all regulation, at least until the Federal Government sees fit to act, and thereby break down the price structure and the business standards within both States.

It is important to note that if the position of your petitioner is sustained by this Court it will be possible for the twenty States with milk control legislation to perfect a veritable network in their stabilization efforts, because the State in which the milk is both pro-

duced and purchased will have jurisdiction to regulate with respect to dealers therein.

It is respectfully submitted that the Supreme Court of Pennsylvania erred in failing to base its decision upon cases of this Court squarely sustaining your petitioner in the instant case; that the decisions of this Court relied upon by the Supreme Court of Pennsylvania are distinguishable, especially in view of the trend of judicial thought arising out of changed economic conditions; that the position of the court below is detrimental to the dairy industry of the United States; and that therefore the decree of the court below should be reversed.

Respectfully submitted,

GUY K. BARD,
Attorney General

HARRY POLIKOFF,
Deputy Attorney General
Counsel for Petitioner.

APPENDIX A

(JUDICIAL FINDINGS SUSTAINING LEGISLATIVE FINDINGS, DESCRIBING DAIRY INDUSTRY OF PENNSYLVANIA; REFERRED TO PARTICULARLY AT PAGE 19.)

Harrisburg Dairies, Inc., a Pennsylvania corporation v. Howard G. Eisaman, John J. Snyder, and Robert E. Pattison, Constituting the Milk Control Commission of the Commonwealth of Pennsylvania	In the Court of Common Pleas of Dauphin County Sitting in Equity No. 1261 Equity Docket No. 183 Commonwealth Docket 1937

OPINION

BY THE CHANCELLOR:

* * * * *

This case came on to be heard and testimony was taken from which we find the following:

FACTS

1. Milk is the most necessary human food, vital for promotion of the public health and for development of strength and vigor in the race.

2. Milk is a most fertile field for the growth of bacteria, and therefore its production and distribution have been surrounded by more costly sanitary requirements than those of any other commodity.

3. Milk consumers are not assured of a constant and sufficient supply of pure, wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk.

4. The Milk Control Commission fixes the price of milk, and bonding of dealers conditioned on paying producers tends to assure payment of the fixed price.

5. A milk producer is required to sell his milk on credit, the term of which is generally not less than one month, and is usually one month to six weeks.

6. This credit period is caused by the fact that milk is sold on a utilization, classified and complicated price basis.

7. The statutory requirement that milk dealers file bonds is related to protection and promotion of the adequacy of the milk supply and the sanitary quality thereof.

8. Milk producers must make delivery of their highly perishable commodity immediately after it is produced, and must generally accept any market at any price.

9. Under the utilization method of payment prevailing in the milk industry, particularly in cities, the value of a producer's market is unknown until the milk dealer sells the fluid milk and uses or disposes of the surplus.

10. Only dealers have facilities for accurately weighing and testing milk; and knowledge of weights, tests and uses is in the exclusive possession of the dealers who, due to error, carelessness or fraud, may report same incorrectly, causing losses to producers.

11. The producers' lack of control over their market is aggravated by the trade custom of dealers in paying weeks after delivery, which custom is recognized by the Milk Control Commission because of the necessity that milk be used before the amount to be paid can be known; and this custom keeps producers obligated to continue delivery in order to receive payment for previous sales, and permits dealers to operate on the producers' capital without giving security therefor.

12. Milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production; they suffer substantial losses, and, in the absence of governmental regulation of milk, would suffer still more.

13. The milk industry is a paramount industry upon which the health and welfare of the Commonwealth of Pennsylvania largely depends.

14. Dishonest and irresponsible milk dealers have defrauded producers and imposed on them by making erroneous calculations of the prices to which farmers are entitled under the complicated pricing formulas used in the industry.

15. Bonding will tend to eliminate dishonest and irresponsible dealers, since they will have difficulty obtaining bonds.

16. Bonding will tend to keep honest dealers from becoming dishonest because the dealer knows that he

must pay the proper price either directly or through his bond and also because bonding has a tendency to prevent a dealer from getting into financial difficulty which drives him into dishonesty.

17. By reason of the producers' lack of contact with their dealers due to living many miles distant from the dealers' place of business, most producers are unable to investigate the dealers' financial condition or reputation for honesty and are the last of the dealers' creditors to discover their financial difficulty or dishonesty and to be paid in case thereof; for this reason producers need the credit protection bonding gives them.

18. Loss to milk producers has been caused by insolvency of honest dealers or by nonpayment by dishonest and irresponsible dealers who buy milk on credit never intending to pay and who move from one group of producers to another.

19. The assurance to a producer, as a result of bonding, that he will be paid for his milk is a definite help in securing satisfactory compliance with sanitary regulations.

20. A milk producer who is not paid currently or who is unpaid for milk is generally unable to buy feed for his cows and his milk suffers in quantity and nutritive quality on this account.

21. Where producers are assured of receiving a fair price for their milk, they can afford to feed costlier high protein feed, in place of natural pasture

and cheaper homegrown grain, and are able to finance a plan of level production of milk throughout the year.

22. Bonding of dealers, conditioned on payment to producers, will force dealers to pay producers the required price and assure the producers that they will receive such price, and thus is related to eliminating unfair competition resulting from failure to pay producers, and surpluses, and to securing a more stable milk supply for the benefit of those portions of the year when there is insufficient.

23. At least 16 companies write the type of corporate surety bond accepted by the Milk Control Commission.

24. Bonds were filed pursuant to the Milk Control Law by 404 milk dealers, or by approximately 40% of all milk dealers subject to the bonding provision of said law, [notwithstanding preliminary injunction relieving them of the necessity so to do].

Questions Involved

1. Is Article V of the Act of 1937 P. L. 417, in violation of Article I, Sections 1 and 9 of the Constitution of Pennsylvania?

2. Is Article V of said Act in violation of Article III, section 7 of the Constitution of Pennsylvania?

3. Is Article V of said Act in violation of Section 1 of the fourteenth amendment of the Constitution of the United States?

DISCUSSION

* * * * *

The constitutionality of the Milk Control Law which we have under consideration and which has been frequently before the courts, has been established by the Supreme Court and by the Superior Court in the recent decisions of Milk Control Board *v.* Eisenberg Farm Products, 200 Atl. 854; Commonwealth ex rel. Margiotti *v.* Ortwein, 200 Atl. 859; Colteryahn Sanitary Dairy *v.* Milk Control Commission, decided by the Supreme Court June 30, 1938, but not yet reported.

* * * * *

Where an act of the legislature depends for its validity upon the existence of certain facts and circumstances which are denied, the courts may inquire into the existence thereof; Borden's Company *v.* Baldwin, 293 U. S. 194; Chastleton, Inc. v. Sinclair, 264 U. S. 543. This we have done and much testimony was taken which formed the basis of our findings of facts in this case.

* * * * *

The facts surrounding the milk industry have been set forth in the preamble to the act under consideration wherein certain legislative findings of facts are made. Thus, we have here not the ordinary preamble discussing broad generalities and purposes, but rather findings of fact which are pointed and significant. The evidence taken upon the final hearing amply sustains and supports these findings to such an extent that it is unnecessary to rely upon the ordinary constitutional presumptions in their favor.

The plaintiff made no effort to dispute that milk is the most necessary human food; therefore the fact will

be accepted as true by this court; and furthermore, milk has already been judicially determined as such in Carolene Products Co. *v.* Harter, et al., 329 Pa. 49.

Milk is a most fertile field for the growth of bacteria, and therefore its production and distribution have been surrounded by more costly sanitary requirements than those of any other commodity. In this respect witnesses of the plaintiff and defendants were in full accord. Inspectors hired by milk dealers testified to the nature of the sanitary requirements imposed upon milk producers by municipalities and by the Commonwealth. There is no testimony whatever to show that any other agricultural commodity is surrounded by any sanitary requirements whatever; hence the peculiar nature of milk in this regard as explained by the Legislature. That "milk is a fertile medium for the development of bacteria" was accepted as "a matter of common knowledge" in Dairymen's Sales Asso. *v.* Public Service Commission, 115 Pa. Superior Ct. 100, affirmed in 318 Pa. 381.

We think milk consumers are not assured of a constant and sufficient supply of pure, wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk. Witness after witness for plaintiffs claimed that milk production is increasing and that the sanitary quality thereof is likewise improving. Both of these contentions were freely admitted by the Commonwealth. That the supply of milk is increasing, however, does not necessarily assure the public an adequate supply thereof. The undisputed testimony is that this increase has merely been in direct proportion to the increase in population. The general trend of

milk consumption, except for temporary variation has been higher and higher. In addition, there are certain seasons of the year when there is a decided shortage of fluid milk in Pennsylvania.

* * * * * *

This evidence gives full support to the statement in the Preamble of the Act which reads as follows:

> "If milk producers are not paid 'the high cost of maintaining sanitary conditions of production and standards of purity', they supply 'unhealthful milk or milk of lower quality because of financial inability to comply with sanitary requirements and to keep vigilant against contamination.' "

It will be noted that all the testimony of the plaintiff with respect to the improving quality of milk was given by milk dealers and milk dealers' inspectors who insisted that the farmers were paid. The plaintiff entirely overlooked that the Milk Control Law is directed at the evils which result when farmers are not paid. It is obvious that a bond which furnishes collateral security for the payment of cost of sanitary production directly tends to maintain such sanitary production.

We think the relationship of bonding to the supply of milk is two-fold: the supply must be adequate; it must be constant. A. H. Lauterbach testified (N. T. p. 206) if the producers' milk check "gets sufficiently behind he cannot run his milk business." One farmer testified (N. T. p. 265) he only kept his "supply up" "by borrowing money." The relationship of bonding to the adequacy of the milk supply was also explained by Mr. Steele, (N. T. pp. 293, 294.)

There is still another phase to the relationship between bonding and adequacy of supply in that the

large cooperative associations will refuse to sell or will discontinue selling to milk dealers who do not pay or do not promptly pay (N. T. p. 202, 271). In ordinary business this would not affect the public; but in the milk business it is clear that if a milk dealer is deprived of his milk supply for a single day consumers will be deprived of a necessity of life for that day.

The Legislature does not need to wait for a crisis in order to promote the adequacy and purity of the milk supply. It does not need to wait for wholesale financial reverses, bankrupting not only milk dealers but also their farmers. The Legislature can act merely because the threat to milk supply "might become serious" (N. T. p. 222); and certainly it can act when mere delinquency of payment is enough to cause the quality of the supply to degenerate (N. T. pp. 222, 246, 247).

Not a single witness for the plaintiff denied the existence of the relationship between bonding and health. They simply insisted that milk producers are paid and that the supply is increasing (N. T. pp. 24, 96). They did not testify as to the quality or adequacy of the supply of those milk dealers to those milk consumers where the producers are not paid, or not promptly paid. Nor did they testify at all that the supply is sufficient all year 'round; on the contrary, some of plaintiff's own witnesses admitted a shortage at times, during which they had to get some fluid milk and fresh cream from other dealers instead of from producers (N. T. pp. 32, 103).

We conclude from the testimony that bonding is related to the prevention of price cutting (N. T. p. 278); that under the utilization method of payment prevail-

ing in the milk industry, particularly in cities, th value of a producer's market is unknown until th milk dealer sells the fluid milk and uses or disposes the surplus (N. T. pp. 197-207); that bonding is r lated to the correct accounting by milk dealers fo their utilization of milk (N. T. p. 227); that onl dealers have facilities for accurately weighing an testing milk, knowledge of weights, tests and use being in the exclusive possession of the dealers (N. T pp. 197, 208, 213, 214); that the producers' lack of co trol over their market is aggravated by the trade cu tom of dealers in paying weeks after delivery, keepin producers obligated to continue delivery in order t receive payment for previous sales, and permittin dealers to operate on the producers' capital withou giving security therefor (N. T. pp. 149, 197, 199, 206) that milk producers are subject to fraud and impos tion, and do not possess the freedom of contract neces sary for the procuring of cost of production, hen they suffer substantial losses (N. T. pp. 304, 305, 30 312, 233, 234); and that the milk industry is a para mount industry upon which the health and welfar of the Commonwealth of Pennsylvania largely de pends.

We are not impressed with the suggestion of th plaintiff that bonds cannot be procured. At least companies write the type of corporate surety bon accepted by the Milk Control Commission, and thi evidence is undisputed (N. T. pp. 313, 317). Bond were filed voluntarily, pursuant to the Milk Contro Law, by 404 milk dealers, or by approximately 40 of all milk dealers subject to the bonding provision o said law, notwithstanding the preliminary injunctio entered (N. T. pp. 303, 314).

We are further of opinion that the bonding requirement of the Milk Control Law does not violate any provision of the State *of* (sic. *or*) Federal Constitutions: Milk Control Board *v.* Eisenberg Farm Products, supra. We think this legislation was enacted for the protection of public health which has always been considered within the proper sphere of state police power. See Carolene Products Co. *v.* Harter, supra. So far as concerns the public welfare, there is no clearer statement of the law of this Commonwealth than that expressed in Nolan *v.* Jones, supra. It is not necessary to multiply authorities to establish that the public welfare is a proper police purpose. The facts surrounding the dairy industry are such that the legislative determination of the existence of conditions requiring protection of the public health and welfare, and prevention of fraud, is not arbitrary or capricious. * * *

For the reasons above expressed we reach the following—

CONCLUSIONS OF LAW.

1. The Milk Control Law of 1937 contains express "legislative findings of fact", describing conditions in the dairy industry. Where the record contains merely conflicting evidence, or a debatable question, as to facts found in such manner by the Legislature, the court may not substitute its independent judgment for that of the legislative body; and under such circumstances the legislative determination is deemed conclusive.

2. It is a legitimate exercise of the state police power to enact legislation in furtherance of public health and welfare, and for the prevention of fraud.

3. The facts surrounding the dairy industry are such that the legislative determination of the existence of conditions requiring protection of the public health and welfare, and prevention of fraud, is not arbitrary or capricious.

4. The statutory requirement that milk dealers file bonds under Section 501 of the Milk Control Law is reasonably related to the protection and promotion and purity of the public milk supply, as well as to the promotion of the public welfare.

5. Section 501 of said Milk Control Law does not violate Article I, sections 1 and 9 of the Constitution of Pennsylvania.

6. Section 501 of said Milk Control Law does not violate Article III, section 7 of the Constitution of Pennsylvania.

7. Section 501 of said Milk Control Law does not violate the Fourteenth Amendment of the Constitution of the United States.

And now, September 6, 1938, it is ordered, adjudged and decreed that the plaintiff's bill of complaint is dismissed at its cost, unless exceptions be filed within the time allowed by law.

(Signed) FRANK B. WICKERSHAM
Chancellor.

APPENDIX B

(PETITION OF SEVEN STATES; SEE PAGE 60, NOTE 14)

TO HON. HENRY A. WALLACE
SECRETARY OF AGRICULTURE
WASHINGTON, D. C.

The States of New York, New Jersey, Pennsylvania, Maryland, Massachusetts, Vermont and Connecticut, constituting a natural production and marketing area, acting through duly designated representatives appointed by the Governors of the States in conference assembled, respectfully and urgently petition you as Secretary of Agriculture to exercise the authority conferred under the Act of Congress known as the Agricultural Adjustment Act, amendments thereto and otherwise, to the end that the power therein delegated to the Secretary of Agriculture may be exercised immediately and effectively in cooperation with the exercise of the police power vested in the said sovereign States, in order to correct a condition that threatens the dairy industry and which affects adversely the health and welfare of a large portion of the population of the United States; and

Whereas the production and distribution of milk is a paramount industry in said States; and

Whereas the necessity of assuring an adequate, constant supply of pure and wholesome milk to this large and concentrated part of the population of the country, together with the existence of an economic emergency which has temporarily disturbed the orderly processes

of production and distribution of milk, have led to the enactment of milk control laws in the States of this area; and

Whereas it is a matter of grave concern to the welfare of the nation that these producers living under conditions that make it difficult to develop cohesion and to bargain effectively, be protected in their marketing operations; and

Whereas recent decisions of the Supreme Court of the United States have recognized that the respective States, through their milk control laws, have exclusive jurisdiction over intrastate commerce in milk, and one decision has held in substance that a state is without power to fix the price of milk to be paid a producer outside the state when such milk moves into the state in the channels of interstate commerce; and

Whereas the regulation of the interstate commerce aspect of the milk problem is regarded as emergent and vitally essential to the regulation of the milk industry within this area;

Now, therefore, the signatories hereto representing the several States within the area, respectfully request that you forthwith place such area under federal license so as to include and regulate the operations of all persons trafficking in or transporting milk in the channels of interstate commerce within such area, all to the purpose of securing for all producers an adequate, equitable and reasonable price for the milk sold or used in such area, and that such purpose be achieved, among other ways, by making the prices and price conditions established by the Control Boards

of the respective states applicable to milk moving in interstate commerce into such states.

March 26, 1935

PETER G. TEN EYCK
For the State of New York

WILLIAM B. DURYEE
For the State of New Jersey

HARRY POLIKOFF
For the Commonwealth of Penna.

DAVID G. HARRY
For the State of Maryland

JOSEPH C. CORT
For the Commonwealth of Mass.

EDWARD H. JONES
For the State of Vermont

CHARLES G. MORRIS
For the State of Connecticut